Supreme Court, U.S.
FILED
JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-1741 and 85-1748

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS, ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

SECONDARY LEAD SMELTERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
F. HENRY HABICHT, II
Assistant Attorney General
ROBERT L. KLARQUIST
SCOTT E. SLAUGHTER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS S. BLAKE
General Counsel
STEVEN E. SILVERMAN
Attorney
United States Environmental Protection Agency
Washington, D.C. 20460

21pp

QUESTIONS PRESENTED

1. Whether the United States Environmental Protection Agency (EPA) complied with public notice and comment requirements of the Administrative Procedure Act when it promulgated effluent limitations guidelines and standards for the primary lead, zinc, copper, and metallurgical acid plant subcategories of the nonferrous metals industry under the Clean Water Act.

2. Whether the court of appeals applied the proper standard under the Administrative Procedure Act in reviewing EPA's promulgation of effluent limitations guidelines and standards for the secondary lead subcategory of the non-ferrous metals industry.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	16

TABLE OF AUTHORITIES

Cases:

American Federation of Labor and Congress of Industries Organizations v. *Donovan*, 757 F.2d 330	8, 9
American Paper Inst. v. *EPA*, 660 F.2d 954	9
American Petroleum Inst. v. *EPA*, 540 F.2d 1023, cert. denied, 430 U.S. 922	13
Baltimore Gas & Electric Co. v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87	10
BASF Wyandotte Corp. v. *Costle*, 598 F.2d 639, cert. denied, 444 U.S. 1096	13
Bowen v. *American Hospital Ass'n*, No. 84-1529 (June 9, 1986)	10
Chemical Manufacturers Ass'n v. *Natural Resources Defense Council*, No. 83-1013 (Feb. 27, 1985)	2, 12
Chocolate Manufacturer Ass'n v. *Block*, 755 F.2d 1098	8
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402	11
E.I. duPoint de Nemours & Co. v. *Train*, 430 U.S. 112	2, 7
EPA v. *National Crushed Stone Ass'n*, 449 U.S. 64	13
Reynolds Metals Co. v. *EPA*, 760 F.2d 549	13
Sierra Club v. *Costle*, 657 F.2d 298	9
South Terminal Corp. v. EPA, 504 F.2d 646	9
EPA v. *State Water Resources Control Bd.*, 426 U.S. 200	2
Tanner's Council of America, Inc. v. *Train*, 540 F.2d 1188	13
Taylor Diving & Salvage Co. v. *Department of Labor*, 559 F.2d 622	9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474	11

Statutes and regulations: Page

Clean Water Act, 33 U.S.C. 1251 *et seq.* 2
33 U.S.C. 1311(b) 2, 6
33 U.S.C. 1311(b)(2)(A) 13
33 U.S.C. 1314(b) 2, 6
33 U.S.C. 1314(b)(2) 13
33 U.S.C. 1316 2
33 U.S.C. 1317(a) 2
33 U.S.C. 1317(b) 2
33 U.S.C. 1317(c) 2
5 U.S.C. 553(b)(3) 5
5 U.S.C. 706(2)(A) 10

Miscellaneous:

48 Fed. Reg. (1983):
pp. 7032 ..... 2, 12
pp. 7032-7126 2
pp. 7044-7045 2
p. 7046 6
p. 7073 6
p. 50906 3
pp. 50906-50907 ..... 3, 15
pp. 52604-52605 15
49 Fed. Reg. (1984):
pp. 8742-8831 3
p. 8743 3
pp. 8744-8755 12
pp. 8751-8752 12
p. 8762 14
p. 8767 14

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1741

AMERICAN MINING CONGRESS, ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

No. 85-1748

SECONDARY LEAD SMELTERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a)[1] is reported at 780 F.2d 445.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985. Petitions for rehearing and rehearing en banc were denied on January 24, 1986. The petitions for a writ of certiorari were filed on April 24, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the separately bound appendix in No. 85-1741.

STATEMENT

These two cases concern the validity of effluent limitations guidelines and standards for the non-ferrous metals industry promulgated by United States Environmental Protection Agency (EPA) pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.* On petitions for review, the court of appeals upheld the guidelines and standards (Pet. App. 1a-33a).

1. In the Clean Water Act, Congress authorized EPA to establish technology-based effluent limitations guidelines and standards for categories of industrial dischargers. See 33 U.S.C. 1311(b), 1314(b), 1316, 1317(a).[2] On February 17, 1983, EPA published proposed guidelines and standards for the nonferrous metals industry. 48 Fed. Reg. 7032-7126.[3] The guidelines and standards were based on data obtained by EPA from responses to questionnaires sent to 319 firms, consulting reports, and scientific literature. Pet. App. 7a-8a; 48 Fed. Reg. 7044-7045 (1983). In the Federal Register publication, EPA announced that the proposed regulations were supported by three major documents, including a "Development Document" which explained the bases of EPA's technical conclusions. 48 Fed. Reg. 7032 (1983).

---

[2] "Effluent limitations guidelines" concern existing industrial dischargers (33 U.S.C. 1314(b)), with the exception of those sources which discharge into publicly owned treatment works, which are governed by "pretreatment standards" (33 U.S.C. 1317(b) and (c)). New source performance standards concern new industrial dischargers (33 U.S.C. 1316). See generally *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 1-8; *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116-121 (1977); *EPA* v. *State Water Resources Control Bd.*, 426 U.S. 200, 203-209 (1976).

[3] EPA had previously promulgated effluent limitations guidelines and standards and pretreatment standards for certain nonferrous metals manufacturing subcategories. See 48 Fed. Reg. 7033-7034 (1983).

EPA made publicly available all three documents, including the Development Document, for inspection and copying (*ibid.*).

The initial comment period, which continued for 11 weeks, was reopened on two occasions. See 48 Fed. Reg. 50906 (1983); 48 Fed. Reg. 52604 (1983). EPA considered the comments and, at least with respect to each petitioner in these two cases, contacted the commenting party to make further inquiry (Pet. App. 7a-8a). In light of these comments, EPA revised several proposals and sought additional data concerning others (*id.* at 8a). On March 8, 1984, EPA published final effluent limitations guidelines and standards. 49 Fed. Reg. 8742-8831. The final administrative record for the rulemaking was approximately 55,000 pages in length (85-1741 Pet. 5). The final rules, like the proposed rules, provided guidelines and standards for twelve subcategories within the general category of nonferrous metals manufacturing. 49 Fed. Reg. 8743 (1984).

2. Petitioners, among others, challenged the validity of the final effluent limitations guidelines for the nonferrous metals industry in a consolidated action in the United States Court of Appeals for the Fourth Circuit. Petitioners in No. 85-1741 argued, inter alia, that certain final effluent limitations guidelines for subcategories of the primary metals industry were invalid because they departed so substantially from the proposed rules that petitioners were deprived of adequate notice of, and a meaningful opportunity to comment on, the final rules (Pet. App. 9a, 13a-14a).[4] EPA's final rules, while basically adhering to the effluent limitations guidelines and standards proposed,[5] added that any plant unable to meet the

---

[4] Because petitioners do not renew their other challenges to EPA's final rules, we do not address those contentions.

[5] The final effluent limitations guidelines and standards were either unchanged or less restrictive than those proposed.

effluent limitations by using the technology described in the proposed rule (lime precipitation, settle, and filter treatment technology (LS&F)) should also use "sulfide precipitation" to achieve the further effluent reduction required (*id.* at 13a).[6] Petitioners complained below that EPA failed to notify them that the agency might rely on that additional method of waste treatment (*id.* at 13a-14a). The court of appeals rejected petitioners' claim on the ground that there was "ample indication [in the record to the proposed rule] that [petitioners] should reasonably have known that EPA was considering sulfide precipitation" (*id.* at 14a-15a). The court noted that the preamble to the proposed rule solicited comments on alternative treatment technologies and that the proposed Development Document discussed in detail the advantages and disadvantages of sulfide precipitation (*id.* at 15a).

Petitioners in No. 85-1748 argued, inter alia, that portions of the final effluent limitations guidelines and standards for the secondary lead industry were invalid because EPA had failed adequately to consider compliance costs, used erroneous data, improperly rejected industry data, and, as a result, imposed unachievable effluent limitations guidelines and standards that lacked record support. Pet. App. 21a-27a. The court of appeals rejected all of these contentions and upheld EPA's rulemaking (*ibid.*). The court ruled that EPA had made a "careful analysis of compliance costs and their economic impact" (*id.* at 23a), did not act arbitrarily in selecting data, particularly in rejecting some of the data supplied by the industry (*id.* at 23a-24a), and otherwise had a reasonable basis in the ad-

---

[6] As explained by the court of appeals (Pet. App. 13a), sulfide precipitation is based on the principle that the addition of sulfide to wastewater will cause certain pollutants to precipitate out and in turn to settle to the bottom of the solution where the solid product may easily be removed. Lime precipitation operates in a similar fashion except that lime is used as the precipitating agent instead of sulfide.

ministrative record for the effluent limitations guidelines and standards finally promulgated (*id.* at 21a-24a, 25a-27a). The court also held that petitioners' challenge to effluent limitations guidelines and standards for the pollutant cadmium was not ripe (*id.* at 25a-26a).

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of any other court of appeals or of this Court, and presents no issue warranting this Court's review.

1. a. Petitioners in No. 85-1741 contend that EPA violated the Administrative Procedure Act (APA) public notice and comment requirements because the final rules relied upon a technology—sulfide precipitation—not relied upon in the proposed rule. Petitioners, however, mischaracterize the notice provided by EPA and misapprehend the APA's procedural mandate, which has been amply satisfied in this case. The APA requires only that an agency make public "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). When promulgating rules under the Administrative Procedure Act, an administrative agency typically will revise proposed rules in response to comments the agency receives—indeed, the agency might well be faulted for not adequately considering the comments if it did not. The agency is not, however, bound to repropose every rule that it chooses to revise. A contrary rule could lead to endless proposed rulemakings and thus to prolonged frustration of important statutory purposes. Instead, an agency is normally obliged to publish a new proposed rule, rather than a revised final rule, only when two circumstances are present: (1) the revision is substantial; and (2) absence of notice would deprive the public of a meaningful opportunity to comment on the revision. Neither circumstance is present in this case.

Petitioners' complaint is not directed to any change in the effluent limitations guidelines or standards between the proposed and final rules, but rather merely to the agency's announcement in the final rules that a supplemental control technology might be used to achieve the level of effluent reduction required. The Clean Water Act requires only that an industrial discharger meet applicable effluent limitations and standards and does not direct the discharger to adopt a particular control technology. See 33 U.S.C. 1311(b), 1314(b). Consequently, EPA's addition of a supplemental control technology was not, without more, a substantial revision of EPA's proposed rule.

In any event, even if the reference in the final rules to the availability of a supplemental control technology could properly be considered a substantial revision, petitioners had adequate notice of that control technology at the proposal stage. As the court of appeals found (Pet. App. 14a-15a), there was "ample indication [in the record] that [petitioners] should reasonably have known that EPA was considering sulfide precipitation." The Federal Register notice of the proposed rules explained that chemical precipitation (which includes sulfide precipitation) was one of the treatment technologies under consideration by EPA and EPA specifically requested comments on "the treatment technologies relied upon for this regulation, and also *other equally effective treatment technologies.*" 48 Fed. Reg. 7046, 7073 (1983) (emphasis added). Even more fundamentally, the Development Document, the importance of which EPA stressed in the Federal Register notice and which EPA made publicly available (48 Fed. Reg. 7032 (1983)), contained an extensive discussion of sulfide precipitation. The Development Document noted that sulfide precipitation is "highly reliable," and is effective in achieving incremental reduction of specific metals that are not fully removed by LS&F technology under the circumstances petitioners main-

tained were present at their plants (A.R. 21718, 21727, 21729, 21730).[7] And, as the court of appeals stressed (Pet. App. 15a), "the Development Document contained several charts on sulfide precipitation, including data on the performance of sulfide-precipitation-sedimentation systems and a comparison of the solubilities of hydroxides and sulfides of selected metals."

Petitioners nonetheless contend (85-1741 Pet. 5, 10-13) that notice was inadequate because the Development Document was not published in the Federal Register and sulfide precipitation was just one of many control technologies discussed in the Document. Concomitantly, petitioners claim (*id.* at 13) that the court of appeals misunderstood the nature of the Document, believing it to be formally part of the proposal (*ibid.*). Both contentions are unpersuasive. The central role of the Development Document is not only well settled in administrative rulemaking under the Clean Water Act (see *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. at 132 n.23) but, as noted above, was highlighted by EPA in its Federal Register notice. A fundamental purpose of the Development Document is to afford "a greater opportunity for public input into the final [effluent limitation] regulations, by giving notice of the general outlines of those regulations" (*ibid.*). The Document need be neither formally published in the Federal Register nor formally part of the proposed regulation to serve this important function. Petitioners, moreover, are particularly hard-pressed to suggest (85-1471 Pet. 12-13) that they were unaware of the importance of the Document and its contents given that they requested, received, and submitted comments on a draft of the Document prior to publication of the proposed rules (A.R. 18496-18506). As the court of appeals properly

---

[7] Citations to the Administrative Record (A.R.) are taken from the brief filed by the government in the court of appeals.

noted (Pet. App. 15a), "industry may not remain silent during th[e] [comment] period only to complain upon appeal that it was deprived of an opportunity to comment on what it might reasonably have been apprised."

Moreover, petitioners were not denied an opportunity to challenge EPA's adoption of sulfide precipitation as a supplemental technology. The court of appeals carefully considered petitioners' objections to sulfide precipitation, particularly their claim that the technology would not reduce effluent concentrations to the required level (Pet. App. 15a-18a). The court concluded that EPA had a reasonable basis for including sulfide precipitation in the final rules and therefore had not acted arbitrarily or capriciously (*id.* at 17a-18a).

b. Petitioners incorrectly assert (85-1741 Pet. 16-18) that the decision of the court of appeals conflicts with the decision of the District of Columbia Circuit in *American Federation of Labor and Congress of Industrial Organizations* v. *Donovan,* 757 F.2d 330 (1985), and with the Fourth Circuit's own prior decision in *Chocolate Manufacturers Ass'n* v. *Block,* 755 F.2d 1098 (1985). In both *Donovan* and *Chocolate Manufacturers Ass'n,* however, the agency had adopted a revised rule the substance of which had not been placed in issue in the initial Federal Register publication and defended its action on the ground that comments from persons other than those asserting inadequate notice had placed the revision in question and thereby provided the necessary notice. See *Donovan,* 757 F.2d at 338-339; *Chocolate Manufacturers Ass'n,* 755 F.2d at 1103. Here, by contrast, EPA revised, but did not fundamentally alter, the very rule that was the focus of the proposal and about which the agency had invited public comment. Moreover, EPA does not claim that notice of the possible relevance of sulfide precipitation technology was supplied by a comment. Instead, EPA submits, and the court of appeals found, that notice was

provided by the initial Federal Register publication and the contents of the Development Document. Petitioners, therefore, can hardly rely on either case to claim unfair surprise, particularly where, as here, the revision was partly triggered by their comments that LS&F technology would be insufficient and that additional treatment technologies would be needed (see Pet. App. 13a; A.R. 26392, 26395, 26456, 26476-26477). See *Donovan,* 757 F.2d at 339-340 ("It would be passing strange for a party which had recommended in its comment that certain changes be made to a regulation later to complain that it had inadequate notice of the possiblity that the regulation might indeed by changed."). Indeed, the decision below merely exemplifies the commonsense notion, repeatedly applied by the courts, that an agency "may make 'substantial changes' in its original proposed rule if the changes are a 'logical outgrowth' of the original proposal and the notice and comments upon it." Pet. App. 15a, quoting *American Paper Inst.* v. *EPA,* 660 F.2d 954, 959 n.13 (4th Cir. 1981); accord *Sierra Club* v. *Costle,* 657 F.2d 298, 352-353 (D.C. Cir. 1981); *Taylor Diving & Salvage Co.* v. *Department of Labor,* 599 F.2d 622, 626 (5th Cir. 1979); *South Terminal Corp.* v. *EPA,* 504 F.2d 646, 659 (1st Cir. 1974).

c. Ultimately, therefore, the petition raises no significant legal issue, but presents only a fact-bound dispute with the court of appeals concerning the adequacy of the notice petitioners received in the particular rulemaking at issue. Petitioners' claim was fully addressed by the court below and further review is not warranted.

2. Petitioners in No. 85-1748 seek review on the ground that the court of appeals did not apply the correct standard of judicial review in considering their challenges to EPA's rulemaking. Specifically, petitioners contend that the court deferred excessively to EPA's expertise by resolving conflicts in the evidence in the agency's favor and

should instead have "scrutinize[d]" the agency decision in "painstaking detail" as required by the Administrative Procedure Act, which petitioners describe as "the only defense private industry has against the carelessness and caprice of the EPA." 85-1748 Pet. 2-5, 14-19. According to petitioners, agency regulations must be "carefully tailored to promote a specific Congressional directive" and "grounded upon a secure foundation in fact" (*id.* at 17). Petitioners, however, misapprehend the role of judicial review under the Administrative Procedure Act of agency rule-making, particularly in cases, such as this one, involving highly technical issues within the expertise of the federal agency. Petitioners also mischaracterize the actions of both the court of appeals and EPA.

a. The APA provides that a court may overturn informal agency rulemaking only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Under this standard, the reviewing court's role is confined to determining whether the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983). When, moreover, as in this case, the court is not reviewing simple findings of fact, but is instead reviewing agency determinations that, pursuant to the technology-forcing mandate of the Clean Water Act, are necessarily based on predictive judgments within EPA's expertise (*i.e.*, the degree of effluent reduction achievable by new and existing dischargers), "a reviewing court must generally be at its most deferential" (*id.* at 103). See also *Bowen* v. *American Hospital Ass'n*, No. 84-1529 (June 9, 1986), slip op. 31 n.30 (plurality opinion) (commenting on recognized expertise of EPA in environmental area).

The court of appeals' review of EPA's rulemaking fully comported with the applicable standard of judicial review. The court "determin[ed] whether [EPA's] 'decision was based on a consideration of the relevant factors and whether there ha[d] been a clear error of judgment.' " Pet. App. 7a, quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). The court examined "whether EPA's technical judgments found support in the record and whether they reflect the rule of reason" and whether EPA had "fairly considered all significant data and comments" (Pet. App. 7a). And the court deferred to the expertise of EPA in disputes between the parties over the weight to be given conflicting data in the administrative record (*id.* at 5a).

At bottom, therefore, petitioners' claim that their petition presents an important question of administrative law regarding the proper scope of judicial review of agency action is inaccurate. The court of appeals plainly applied the correct standard of judicial review. The petition raises only the issue whether the court below *misapplied* the correct standard of review in this particular case—an issue that does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951) ("power to review the correctness of application of the [proper] standard [of judicial review of agency action] ought seldom to be called into action"). Because, moreover, it is clear that the court of appeals correctly applied that standard in upholding EPA's rulemaking in this case, further review would be particularly inappropriate.

b. As stressed by the court of appeals (Pet. App. 7a-8a), EPA amply satisfied APA notice and comment requirements in its exhaustive investigation of the nonferrous metals industry prior to promulgating the final effluent limitations guidelines and standards. The agency gathered data from responses to questionnaires sent to 319 firms representing 419 facilities, and from plant visits, in-

dustry consultations, and scientific journals (*id.* at 8a). The agency prepared trip reports based on its follow-up on-site visits to specific plants, allowing those plants visited an opportunity to comment on the report (*ibid.*). The agency published proposed rules, made available record material in support of the proposal (48 Fed. Reg. 7032 (1983)), provided substantial time and opportunity for public comment, including a public hearing and a public workshop (A.R. 26928-26986), solicited additional data from industry through written communications (49 Fed. Reg. 8744-8755 (1984)), and remained in telephone contact with companies throughout (see, *e.g.*, Pet. App. 43a-45a). See generally *id.* at 8a. The resulting administrative record of 55,000 pages reflects the careful and considered attention EPA gave to what all must agree is a difficult statutory assignment. See *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 15-16 & n.24.

None of the specific claims petitioners renew in this Court suggests a contrary conclusion. Petitioners, for example, argue that EPA relied upon unreliable data in promulgating lead content effluent limitations guidelines (85-1748 Pet. 10-12). In particular, petitioners assert that "EPA improperly gave data [from a battery manufacturing plant] too much weight in promulgating the concentration limits," gave insufficient weight to industry data, and failed to identify a secondary lead plant currently capable of complying with the limitations (*id.* at 11-12). The court of appeals thoroughly considered and properly rejected these contentions (Pet. App. 24a-25a). The court of appeals correctly concluded that EPA's use of data from the battery manufacturing plant was "not unreasonable" because EPA had also relied on data based on the performance of plants with wastewater of lead concentration levels comparable to those of petitioners' plants (*ibid.*); see generally 49 Fed. Reg. 8751-8752 (1984)). The court

further concluded that EPA had not acted arbitrarily in rejecting other data submitted by petitioners because, as EPA had explained (Pet. App. 25a), petitioners had not shown that the data represented exemplary operation, as required by the Clean Water Act. Petitioners may continue to disagree with those conclusions, but their assertion that the court of appeals neglected to review and carefully consider their objections is groundless.

Petitioners' additional argument that the court of appeals failed to consider the absence of a showing that a secondary lead plant was currently meeting those limitations similarly lacks merit. It is well settled that the effluent limitations and standards petitioners challenge can be and were properly based on the performance levels which *other* industries have achieved by using the underlying treatment technology. See, *e.g.*, *Reynolds Metals Co.* v. *EPA*, 760 F.2d 549, 559 (4th Cir. 1985); *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 645 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980); *American Petroleum Inst.* v. *EPA*, 540 F.2d 1023, 1035-1036 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977).[8]

---

[8] The effluent limitations guidelines at issue are generally based on "best available [control] technology economically achievable" (see 33 U.S.C. 1311(b)(2)(A), 1314(b)(2)), which this Court has described as reflecting "a commitment of the maximum resources economically possible to the ultimate goal of eliminating all pollution discharges." *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 74-75 (1980). Petitioners mistakenly cite (85-1748 Pet. 11-12) *Tanner's Council of America, Inc.* v. *Train*, 540 F.2d 1188 (4th Cir. 1976), for the proposition that EPA must demonstrate that an existing secondary lead plant currently meets its promulgated BAT limitations (85-1748 Pet. 11-12). In *Tanner's Council*, the Fourth Circuit held merely that *some* existing facility should be meeting the effluent limitations; the court did not rule that one of the existing facilities in the particular industry category or subcategory to which the proposed effluent limitation will apply must already meet the limitation. 540 F.2d at 1192 n.10. Indeed, the court in *Tanner's Council* specifically held that EPA may establish effluent limitations guidelines and standards based on the perform-

Equally unpersuasive is petitioners' claim (85-1748 Pet. 12) that the court of appeals ignored their argument that EPA improperly relied on a filtration technology that the agency had considered and rejected when promulgating effluent limitations guidelines for other industries. The court of appeals directly addressed this argument and held that EPA had not acted arbitrarily (Pet. App. 22a-24a). The court stated that "such inter-industry comparisons are not determinative. The question is whether filtration should be required for the secondary lead industry, not whether it should be required for some other industry." Pet. App. 22a-23a (citations omitted).[9] The court in turn examined EPA's assessment of the costs of compliance in the secondary lead industry, including the economic impact of compliance, and concluded that EPA fully considered the costs of achieving effluent reduction as required by the Clean Water Act (*id.* at 23a-24a). Petitioners' claim that their arguments were ignored by the court of appeals and by EPA therefore is flatly contradicted by the record.

---

ance of facilities in other industrial categories. *Id.* at 1192. That decision, therefore, is entirely consistent with the same court of appeals' decision in this case.

[9] As the court of appeals noted (Pet. App. 23a n.2 (emphasis added)), "that the agency *may* undertake such comparisons in establishing BAT for a particular industry poses no anomaly. * * * * * [There is] a difference in terms of the statutory purpose between an industry pleading comparisons as a basis for the most lenient guidelines and the agency utilizing comparisons in assessing [BAT]". In addition, EPA specifically found that larger quantities of the more toxic pollutants are removed by multimedia filtration in the secondary lead category than in other industries and that the use of filtration by secondary lead smelters would remove on an annual basis over one ton of toxic pollutants more than the next available, less stringent treatment option. See 49 Fed. Reg. 8762, 8767 (1984); A.R. 41742-41743, 44389-44438.

Petitioners' final two points of contention—(85-1748 Pet. 12-13) that the court of appeals gave short shrift to their claims that EPA's "cadmium limitation standards" were invalid and that EPA had violated APA notice and comment requirements—raise no issue requiring this Court's attention. With respect to the former, the court of appeals correctly held that petitioners' claim was not ripe (Pet. App. 25a-26a). EPA did not promulgate *any* cadmium limitations or standards applicable to secondary lead smelters and instead left their development and imposition to the permit-issuer or control authority in individual cases. Consequently, there are no cadmium limitations or standards for petitioners to challenge. If and when EPA chooses to promulgate cadmium limitations or standards on an industry-wide basis, or a permit-issuer or control authority decides to impose such limitations on a specific secondary lead facility, there will be ample opportunity for the facility to challenge any limitations or standards imposed. Petitioners' mere speculation that a permit-issuer might look to cadmium limitations applicable to other industries does not give rise to a justiciable controversy.

Petitioners' claim (85-1748 Pet. 13) that the court ignored EPA's violations of "fundamental principles of administrative law" in promulgating the lead limitations and standards lacks any record support. The court of appeals specifically held that EPA had "conducted its rulemaking in conformity with the [APA]" and the court, as discussed above, thoroughly reviewed petitioners' contentions that EPA had relied on erroneous data and improperly rejected industry data. Pet. App. 24a-25a, 32a. EPA, moreover, made publicly available the key methodologies and data underlying its lead limitations and standards, and twice reopened the public comment period to solicit additional public comment on those data and methodologies. See 48 Fed. Reg. 50906-50907 (1983); 48 Fed. Reg. 52604-52605

(1983). Petitioners' claim that EPA violated the APA by not notifying petitioners that the agency planned to discount certain industry data borders on the frivolous. Such a notice requirement would lead to a never-ending cycle of public notice and comment and thereby frustrate important statutory purposes, which, in the case of the Clean Water Act, Congress determined must be implemented by the agency within specified time deadlines.

c. In sum, petitioners' claim that the court of appeals applied the incorrect standard of judicial review is wholly insubstantial. The court clearly articulated the proper standard of review and applied that standard correctly in upholding EPA's rulemaking.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

ROBERT L. KLARQUIST
SCOTT E. SLAUGHTER
Attorneys

FRANCIS S. BLAKE
General Counsel

STEVEN E. SILVERMAN
Attorney
United States Environmental Protection Agency

JUNE 1986

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20255